BANK OF INDIA

v.

POUHARI SARAN RAI

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[SUIT NO. 1534 OF 1990]
3 MAY 1991

CONFLICT OF LAWS: *Loan agreement - Foreign jurisdiction clause - Court's discretion - Jurisdiction of local Court - Correct procedure for defence - Supreme Court of Judicature Act [Sing], s. 16(1)*

The defendant is appealing against a summary judgment entered against him for a sum of over Yen 28 million, being a loan granted to him by the plaintiffs in Osaka, Japan. The defendant denied liability, claiming that the loan was actually lent to an entity called OPB. The main issue is whether the defendant is personally liable as the said agreement had been signed by the defendant as a proprietor of OPB. The agreement stated that it would be governed by the laws of Japan.

The plaintiffs adduced evidence that the defendant had, in his own handwriting, on OPB stationery requested that he be given more time to repay the loan. The plaintiffs also adduced evidence that OPB was not incorporated and that the defendant was registered under the laws of Japan as the proprietor of OPB.

The defendant adduced expert evidence that there is a possibility that OPB is not a juridical company, that OPB might also be a partnership, in which event the defendant would only be liable to extent of his investment therein. The defendant maintained that he should be given unconditional leave to defend the action against him as the issues in this action involved foreign law.

Held:

[1] There was no dispute on Japanese law as a fact, even on the basis of the expert opinion adduced by the defendant. The defendant is liable for the borrowings of OPB if he is a proprietor or partner of OPB; in the latter case, to the extent of his investment in the partnership. The defendant is *prima facie* OPB's proprietor as he had registered himself as such. He had never claimed that OPB was a partnership, nor had he claimed that OPB was a non-juridical person under Japanese law.

[2] There is no rule that a foreign jurisdiction clause will be enforced as an agreement and it is up to the Court to exercise their discretion. In the present case, the defendant was resident in Singapore and under s. 16(1) of the Supreme Court of Judicature Act, the local Court has jurisdiction. Furthermore, on the evidence, there was no real connection between the Osaka Courts and the dispute or the defendant. The defendant also has no property in Osaka. He had in fact moved back to Singapore. It would not therefore be just and reasonable to compel the claim to be tried in Osaka.

[3] In raising the issue of jurisdiction as a defence to action, the defendant had adopted an incorrect procedure. He should have applied to stay the action. Without a stay, there was no defence whatsoever against the plaintiffs' action.

[4] Order 77 r. 9 of the Rules of the Supreme Court enables action against a proprietor of a firm: he may be sued in the name of the firm and a creditor may sue the proprietor of a firm. As the debts of the proprietor of a firm cannot be distinguished from his personal debts from the view of liability to the creditor, nor can his trading assets be distinguishable from his personal assets from the point of view of enforcement of any judgment against him there is no reason why the proprietor cannot be sued in his personal name without reference to the firm so long as the debt is identified and proved. Rule 9 did not apply as the defendant did not carry on business within the jurisdiction under the name of Messrs OPB.

[Appeal dismissed.]

Cases referred to:
The Western National Bank of New York v. Perez, Triana & Co. [1891] 6 TLR 366 ***(con)***
MacKender v. Feldia Ag [1967] 2 QB 590 ***(dist)***
The Eleftheria [1969] 2 All ER 641 ***(foll)***

Legislation referred to:
Rules of the Supreme Court [Sing], O. 77 r. 9
Supreme Court of Judicature Act [Sing], s. 16(1)

Other source referred to:
The Conflict of Laws, 11th Edn., p. 412, Dicey & Morris

For the appellant/defendant - P. Suppiah
For the respondents/plaintiffs - Sarjit Gill Singh

JUDGMENT

Chan Sek Keong J:

This was an appeal by the defendant against summary judgment being entered against him in the sum of Yen 28,644,484 and interest thereon, being money lent to him by the plaintiffs in Osaka.

The defendant disputed his liability on several grounds. The first was that the money was lent by the plaintiffs' Osaka Branch to an entity called Osaka Peekay Boeki (Messrs OPB) under a document called agreement on bank transactions. The said agreement was dated 18 April 1983 and signed by the defendant in Osaka as proprietor of Messrs. OPB which was then trading in Osaka. Article 15 of the said agreement provided as follows:

> This agreement shall be governed by the laws of Japan. I/We hereby agree that the Court having the jurisdiction in the locality in which your Osaka office is situated shall be the competent Court over any legal action which is instituted in connection with this agreement.

The amount claimed by the plaintiffs was not disputed. Messrs. OPB had acknowledged the debt in letters signed by the defendant as "manager". The issue was whether the defendant was personally liable as "proprietor" of Messrs. OPB. The plaintiffs adduced evidence as follows: that the defendant was registered under the laws of Japan as the proprietor of the Messrs. OPB, and that the entity was not incorporated, and that the plaintiffs had received a personal letter dated 22 April 1988 from the defendant in his own handwriting on the letterhead of Messrs. OPB requesting that he be given more time to pay his overdraft.

The defendant obtained an opinion in English on Japanese law from a Japanese lawyer who spoke and wrote English fluently. His opinion may be summarised as follows: that Messrs. OPB was not registered as a corporation, but that did not, *per se*, render the defendant liable for the borrowings of Messrs OPB, "because there is a possibility that (Messrs OPB) is a

non-juridical company" which was not registered as a corporation, but was substantially a corporate body or company; that this concept had been recognised by the Supreme Court of Japan in a decision and also by the majority opinion of legal scholars; that to be such a non-juridical person, certain conditions stated in the Supreme Court judgment had to be met, and whether they were met by Messrs OPB was a question of fact to be determined at the trial, after hearing evidence; that Messrs OPB might also be a partnership, in which case, the defendant would only be liable to the extent of his investment therein. The opinion did not set out what the characteristics of a non-juridical person were under Japanese law.

Counsel for the defendant relied on this opinion to found an argument that as the issue involved foreign law, unconditional leave must be given. He referred to *The Western National Bank of New York v. Perez, Triana & Co.* [1891] 6 TLR 366. In that case, the defendant, SK, was sued on bills of exchange on which a Bogota firm, of whom he was a partner, was liable. The bank applied for summary judgment. SK put up the defence that he had authorised his agent to enter into a contract on his behalf to become a "special" and not a general partner of the firm, the effect of which, by the law of New York was to limit his liability provided it be registered; that his agent had neglected to register it, so that as he had never given authority to enter into a general partnership, he was not liable. Lord Coleridge held that it was impossible for the Court to try a question as to the law of New York on affidavits, and that SK was entitled to defend on the claim.

The report of this decision did not say whether any evidence of a New York lawyer was before the Court. As foreign law is a question of fact, it would, presumably, have not mattered that SK had not obtained an opinion on New York law, provided that the bank had also not obtained an opinion to the contrary. In effect, Counsel for the defendant was in fact contending that there was a dispute on the fact as to what Japanese law was.

In my view, there was no dispute on Japanese law as a fact, even on the basis of the expert opinion adduced by the defendant. It was clear from the opinion that the defendant was liable for the borrowings of Messrs OPB if he was the proprietor or a partner, and in the latter case, to the extent of his investment in the partnership. The defendant was *prima facie* the sole proprietor as he had registered himself as such. He had never claimed that Messrs OPB was a partnership. That only left the possibility that Messrs OPB could have been a 'non-juridical person' under the laws of Japan. However, the defendant had also not claimed that Messrs OPB was such a legal corporate entity, nor could he have done so since the Japanese lawyer had not in his opinion disclosed the prerequisites of such an entity. In my opinion, an "if" opinion does not give rise to a dispute of fact.

Counsel for the defendant also argued that this Court had no jurisdiction by reason of cl. 15 of the bank facility agreement which conferred exclusive jurisdiction on the Osaka Courts. Counsel referred to *Mackender v. Feldia Ag* [1967] 2 QB 590. In that case, the plaintiffs, Lloyd's underwriters, issued a jeweller's block insurance policy covering the defendants, who were diamond merchants incorporated in 3 different European countries, against loss or damage to their stock anywhere in the world. The policy contained a foreign jurisdiction clause providing that it should be governed exclusively by Belgian law and that any disputes thereunder should be "exclusively subject to Belgian jurisdiction". Diamonds and pearls were lost in Naples, and the defendants made a claim under the policy. The plaintiffs, after investigations, rejected the claim on the ground that the defendants had made a practice of smuggling diamonds into Italy, that it was contrary to English policy to insure goods which were intended to be smuggled into a friendly country and that the defendants had been

guilty of non-disclosure of this practice. The plaintiffs issued a writ for a declaration that they were not liable and obtained leave to serve the writ out of the jurisdiction. The Court of Appeal allowed the defendants' appeal on the ground that as the parties had agreed to the foreign jurisdiction clause which gave exclusive jurisdiction to the Belgian Courts, the dispute should be allowed to be decided by the Belgian Courts.

Under English law, the question whether an English Court will assume jurisdiction in such cases is one of discretion. There is no rule that a foreign jurisdiction clause will be enforced as an agreement. In *Mackender's* case, the defendants were outside the jurisdiction. That type of case is to be distinguished from one where the defendant is within the jurisdiction, and therefore one where the Court would have jurisdiction but for the exclusive jurisdiction clause. In the former type of case, the plaintiff has a heavier burden of proving why the domestic Court should assume jurisdiction when the parties have agreed otherwise. Parties are expected to abide by their contracts: see Dicey & Morris: *The Conflict of Laws*, 11th Edn., p. 412. Of course, even where the defendant is within the jurisdiction, the plaintiff must also satisfy the domestic Court that there are circumstances why he should be allowed to resile on his word. Brandon J summarised some of these circumstances in *The Eleftheria* [1969] 2 All ER 641 as follows:

> (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts; (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would - (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

The present case was one where the Court had jurisdiction as the defendant was resident in Singapore: see s. 16(1) of the Supreme Court of Judicature Act. This was not a case of service outside the jurisdiction. On the evidence, there was no real connection between the Osaka Courts and the dispute or the defendant apart from the bank facility agreement, which was merely of historical interest as the defendant had ceased business in Osaka and had moved back to Singapore. He had no property in Osaka. It would not be just and reasonable to compel the claim to be tried in Osaka.

The issue of jurisdiction was raised as a defence to the action at the hearing before the Assistant Registrar and this Court. This was an incorrect procedure. Counsel should have applied to stay the action. Absent of a stay, there was no defence at all.

The last ground of defence was procedural. It was contended that the defendant could not be sued in his own name but only as the proprietor of the firm or in the name of the firm. There is no such rule of procedure. Order 77 of the Rules of the Supreme Court regulates actions against partnerships and not proprietorships. Rule 9 thereof is an enabling provision which facilitates an action against a proprietor of a firm: he may be sued in the name of the firm. As the debts of a sole proprietor of a firm cannot be distinguished from his personal debts from the point of view of liability to the creditor, nor can his trading assets be distinguishable from the point of view of enforcement of any judgment against him, I saw

no reason why such a debtor could not be sued in his personal name, without reference to the firm so long as the debt is identified and proved. In any case, r. 9 did not apply as the defendant did not carry on business within the jurisdiction under the name of Messrs OPB.

For the above reasons, the appeal was dismissed with costs.

Also found at [1991] 3 CLJ 2265